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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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HERMES INTERNATIONAL, *et al.*,

Plaintiffs,

v. 22 Civ. 384 (JSR)

MASON ROTHSCHILD,

Defendant.

Oral Argument

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New York, N.Y.
November 18, 2022
2:00 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

BAKER HOSTETLER LLP
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CHRISTOPHER SPRIGMAN

(Case called; appearances noted)

THE COURT: Good afternoon.

I should mention that this very imposing jury consists of students at a class I teach at Columbia Law School. I promised them they would hear exceptional lawyers today, so you're under pressure.

Since these are cross-motions, there's no natural order, so why don't we start with defense counsel. Both counsel, when you are speaking, you should go to the rostrum there.

We'll hear from defense counsel first.

MR. MILLSAPS: Good afternoon, your Honor.

Six months of intensive discovery and plaintiffs' moving-target papers, and voluminous papers, show what Mr. Rothschild has maintained from the beginning -- plaintiffs don't have a case and never had one.

First, it's undisputed that the MetaBirkins images at issue in this case are flat, two-dimensional digital images that depict imaginary --

THE COURT: As I'm sure you know, it's a requirement, to be a federal judge, to be technologically ignorant; I am fully qualified in that regard. Tell me how you define an NFT.

MR. MILLSAPS: An NFT, your Honor, it's in the record, and it's undisputed. An NFT is a code, a bit of code on the blockchain, which is a public-server sort of situation, where

there is -- an NFT is the code that exists on the blockchain, and the reason that it's unique -- an NFT, of course, is a non-fungible token, so an NFT is that bit of code that is publicly identifiable and traceable. One is able to look at the blockchain and to see when an NFT was created, when that particular token was created.

THE COURT: Can you purchase an NFT?

MR. MILLSAPS: People can purchase an NFT.

THE COURT: Right. So what is it you're purchasing?

MR. MILLSAPS: That's a great question, your Honor.

An NFT, because it's just a bit of code on the blockchain, an NFT has to have some sort of function or something else that it's associated with or that it points to. And so an NFT may serve in several different ways. It may serve as a token for admission to an event, for instance, in which case it would be functioning as an admission ticket. NFTs often serve as essentially deeds of ownership or certificates of authenticity of artwork. There's a whole market out there now of NFT artwork.

THE COURT: In this case, were purchasers becoming the owners or were they becoming lessors?

MR. MILLSAPS: Purchasers become the owner of the NFT and the media that is attached to the NFT. So they become the owner of that particular digital image.

THE COURT: Do you require persons who purchase NFTs

to enter into smart contracts?

MR. MILLSAPS: Your Honor, the smart contract is embedded on the blockchain with the NFT. So the smart contract is public, and that's the contract that governs the terms around the NFT.

THE COURT: Right. So it is, like all shrink-wrapped agreements, a total meeting of the minds. Under your smart contract, didn't you retain all sorts of rights with respect to the underlying MetaBirkin or whatever you relate it to?

MR. MILLSAPS: So, the smart contract does not transfer, for instance, the ownership of the IP. The copyright is not transferred by the artist.

THE COURT: Right. That's what I figured. It sounds to me -- maybe I'm just missing something; that's why I'm asking -- more like a lease. The person who purchased the NFT could record that they had purchased it. They could tell their innumerable friends and acquaintances, gosh, I just purchased this particular NFT, but they couldn't transfer the NFT without permission. Do I have that right?

MR. MILLSAPS: Your Honor, they can transfer the NFT at any time under the smart contract. They can sell it like any other --

THE COURT: OK.

MR. MILLSAPS: -- any other piece of art.

THE COURT: What is it that you retained under the

smart contract?

MR. MILLSAPS: Under the smart contract, the creator or the artist retains a right to receive royalties. So if the artwork is transferred, if it's sold to a new transferee, then the smart contract automatically sends a royalty to the creator. The creator also retains, for instance, the copyright rights and the artwork that's attached to the NFT, so the copyright is not transferred.

THE COURT: Did I miss something? I thought that you could change the underlying image.

MR. MILLSAPS: It's technically possible to change the image that the NFT points to, but there's no evidence in the record here that Mr. Rothschild has ever had any intention to change that.

THE COURT: That's a different question, and certainly relevant, but what I'm getting at is under the smart contract he retained the right to change the image. Yes?

MR. MILLSAPS: He didn't retain the right. The way that the NFT functions is that it points to something else, and the creator of the NFT determines what it points to when it's created. And also under the contract --

THE COURT: What it pointed here to was an image of a fur-covered Birkin bag. Yes?

MR. MILLSAPS: Yes, your Honor.

THE COURT: Does that mean that if tomorrow

Mr. Rothschild said, oh, I'm sick of the Birkin bag and he changed it into an image of Aaron Judge wearing a halo, which is certainly appropriate, that would be totally within his legal rights?

MR. MILLSAPS: That would be within his power. Whether it's within his legal rights might be a question.

THE COURT: Well, under the smart contract, he had the right to do that. Yes?

MR. MILLSAPS: He has the ability to do it. It's unclear whether he would have the right to do it because of the way these were originally sold; the way he held it out to the public, someone may be able to argue they believed they were buying this MetaBirkins artwork in particular, and so there was a contract that was formed. That might be possible.

THE COURT: I'm not sure what you mean by the power but not the right. Are you saying the smart contract doesn't resolve that?

MR. MILLSAPS: The smart contract, your Honor, is code, essentially. It's not a human-readable contract necessarily in the way that a written contract would be, and the smart contract, for instance, automatically transfers the royalties when there's a resell. It functions in certain automatic ways.

What I'm saying when I say he has the power to do it is he has the technical ability to do it.

THE COURT: Let's take the royalties. It's a good example. Are you saying if someone who purchased an NFT and then resold it somehow could fiddle with the mechanism so that the royalty was not automatically sent to Mr. Rothschild that he could not sue for the royalty?

MR. MILLSAPS: The purpose of the blockchain, your Honor, is to create this in such a way that someone could not fiddle with that. It's all publicly available. You're able to publicly monitor it. It's contained on decentralized servers, and so it doesn't seem possible to me that somebody could tamper with the royalties there in that way.

THE COURT: So if you're purchasing an NFT and the person who purchased it believes they are purchasing thereby access, exclusive access to a particular image of a fur-covered Birkin bag and they have no ability to change any of that other than if they sell the whole NFT, isn't what they're really purchasing something related to the Birkin bag?

Maybe I misunderstood the argument you were just about to start to get into when you said two dimensional. Two dimensional meaning the NFT is two dimensional or two dimensional meaning the image of the Birkin bag is two dimensional, or what?

MR. MILLSAPS: So, the image associated with the NFT is a two-dimensional artwork. It's just a depiction of an imaginary Birkin bag covered in fur. The NFT doesn't actually

link to a Birkin bag.

THE COURT: No. It links to an image. I understand that.

MR. MILLSAPS: It links to the artwork.

THE COURT: But the person who is purchasing it is then purchasing the right, the exclusive right, to the image, right?

MR. MILLSAPS: It's not an exclusive right to the image, your Honor. It's ownership of that NFT, that bit of code and the media that's attached to the NFT, so the actual digital file that's attached to the NFT.

THE COURT: I guess maybe I'm still too ignorant about how all this works. You're not purchasing the NFT because you want a number; you're purchasing it because you want to have access to the underlying image. Yes?

MR. MILLSAPS: Not exactly access to it. You want to own the underlying image.

THE COURT: So it's the underlying image that's being sold.

MR. MILLSAPS: That's right, your Honor. In this instance, when the NFT is attached to an image, then it would be the image that's being sold. The NFT has no character on its own because it's just a bit of code.

THE COURT: That's really what I wanted to understand.

MR. MILLSAPS: Yes.

THE COURT: OK. Go ahead. You can continue.

MR. MILLSAPS: OK.

So, it is undisputed that what is attached to the NFTs in this case are flat, two-dimensional digital images that depict imaginary Birkin bags covered in, as Dr. Blake Gopnik put it, goofy, garish fake fur. In other words, they're plainly expressive works protected by the First Amendment, and the Court was correct to rule at the outset that *Rogers v. Grimaldi* applies here. Based on the undisputed facts, *Rogers* should be the beginning and the end of this case. Plaintiffs know this, which is why they're now making a new argument, at the eleventh hour, in their summary judgment papers that the NFTs associated with the MetaBirkins artworks are somehow separable from those artworks.

THE COURT: That's why I was asking the questions I was just asking, but go ahead.

MR. MILLSAPS: Thank you, your Honor.

But Hermès's own evidence shows that the NFTs at issue here were always associated with the MetaBirkins artworks. Mr. Rothschild previewed MetaBirkins artwork that would be attached to the NFTs for weeks before he -- I'm sorry -- for weeks before the NFTs were minted and sold. Because of the way that Mr. Rothschild promoted and previewed the MetaBirkins artworks, the MetaBirkins NFT minters knew they would be getting a MetaBirkins artwork; they just didn't know which one

until after the minting was completed.

THE COURT: According to what you just said, they knew they would be getting one of these garish --

MR. MILLSAPS: Oh.

THE COURT: Go ahead. That was just an irrelevant comment.

MR. MILLSAPS: Thank you, your Honor.

Moreover, it's undisputed that NFTs are just bits of code on a blockchain, as we just discussed. They thus have no character of their own but, rather, take on the character of whatever they're associated with. In this case, the NFTs are associated with expressive works protected by the First Amendment. Additionally, Dr. Blake Gopnik has explained in unrebutted expert testimony that even the way in which Mr. Rothschild used NFTs in this particular instance was a work of art in the vein of Andy Warhol's business art.

THE COURT: There is at least some evidence, as I recall the briefs, that his main, that he was interested mainly in making a buck.

MR. MILLSAPS: Are your Honor, Hermès submitted a lot of Mr. Rothschild private communications with his business associates and others in which they discussed making money. As Dr. Gopnik also explained in unrebutted testimony, every artist wants to make money. Every artist hopes that they're going to become rich. Most don't become as rich as Damien Hirst or

Coombs, but most artists aspire to do that, and indeed, most people are interested in making money at whatever they're doing.

THE COURT: With the obvious exception of federal judges.

MR. MILLSAPS: That is one glaring exception.

THE COURT: Go ahead.

MR. MILLSAPS: And so Dr. Blake Gopnik, again, it's interesting because plaintiffs hired three experts in this case. They did not hire an art expert, and they knew that this case turns on this First Amendment issue since before filing this case. And so Dr. Gopnik, who is one of the leading art experts in the country, has unrebutted testimony in this case, and his unrebutted expert testimony is that Mr. Rothschild's expressed desire to make money from his artwork says nothing about whether or not this is artwork.

THE COURT: So assuming the jury were to find that his mental processes were I can fool people into buying my artwork by making them think that they're buying something from Hermès, that would still be a problem even if the First Amendment's involved; yes?

MR. MILLSAPS: Your Honor, that's not the test under *Rogers*.

Under *Rogers*, the defendant needs to make a threshold showing that this is art or expressive -- not art but an

expressive work created, protected by the First Amendment. And so the Court should be looking at the work itself to determine whether, in fact, it is speech or an expressive work protected by the First Amendment. Dr. Gopnik --

THE COURT: Yes, but if I recall, that's not the end of the *Rogers test*.

MR. MILLSAPS: That's not the end of the *Rogers* test, your Honor.

Then, once that threshold showing is made, then the plaintiffs must show two things. The plaintiffs bear the burden of proving, first, that the use of the mark is not artistically relevant -- so in this case that MetaBirkins, the title, is not artistically relevant -- to the artwork; and secondly, that -- either one, of course, is sufficient, either that or that the mark was used in an explicitly misleading way, that explicitly misled -- in connection with the artwork, explicitly misled people as to the source of the content.

And so in this case, there is no evidence in the record that MetaBirkins is not artwork. There is only undisputed evidence in the record both from Mr. Rothschild's own testimony, from the testimony of his associates who were working with him and from the unrebutted expert testimony of Dr. Blake Gopnik recognizing the MetaBirkins image as artwork, and Dr.Blake Gopnik goes even further, because your Honor got this right in your opinion on the motion to dismiss in

recognizing --

Sorry. What was that?

THE COURT: I must have been lucky that day. Go ahead.

MR. MILLSAPS: It was when your Honor recognized that these images are two-dimensional artworks, they're representations or depictions of imaginary Birkin bags, they're art on that level, but Dr. Blake Gopnik goes further and says -- it was Dr. Blake Gopnik, by the way, who published the definitive biography of Andy Warhol in 2020, nearly a thousand pages. And Dr. Blake Gopnik says not only is that obviously creative expression, the images attached to the NFTs, but the way that Mr. Rothschild used NFTs in this particular instance to sell those images, the way those NFTs now exist in the world, the way they move in the world is itself business art in the vein of Andy Warhol and other artists who have engaged with commerce throughout the ages, from Duchamp to Warhol to others that Dr. Gopnik has discussed. And so MetaBirkins here are functioning as art on multiple levels, one of which is the fact that they are essentially paintings of depictions -- they're essentially digital paintings of fanciful, goofy fur-covered Birkin bags, but also the way that Mr. Rothschild put them into the world and used NFTs in this instance, Dr. Gopnik has recognized as actually a brilliant form of business art, and there's nothing in the record to rebut that.

THE COURT: All right. I'm going to interrupt you at this point and hear from your adversary. We'll come back to you shortly.

MR. WARSHAVSKY: Good afternoon, your Honor.

I don't know if there's anything you want me to address or if I could just go to some of the statements by my colleague.

THE COURT: Well, he's saying that, even though it makes use of the Birkin bag image and name, it has been transformed into something that is of artistic expression and, therefore, is protected under the First Amendment except in very narrow circumstances. What do you say to all that?

MR. WARSHAVSKY: Well, I don't know that it's that narrow, your Honor, and your Honor, you addressed this, the *Rogers* test itself. Sorry. I can't remember. I think it's footnote 3 in denying the defendant's motion for an interlocutory appeal, you pointed out that there are three questions. The first is whether or not it's an expressive work, and let's say they're correct on that. But then there's two more questions, and I'm going to read from it -- I apologize -- just so I get it right.

The second question is whether the use of the trademark bears any, quote, artistic relevance to the underlying work. That's the second question, and the third is even if so, if it is artistically relevant, whether the work is

entitled to protection if it's explicitly misleading as to its source or content. And so I think I would go to the second and third of those tests, because that's what we discussed on the motion to dismiss, and I think the evidence is overwhelming on that.

THE COURT: Let me just make sure I understand that. Are you then conceding that for purposes of summary judgment your adversary satisfies the first prong?

MR. WARSHAVSKY: No.

THE COURT: Why not?

MR. WARSHAVSKY: Well, because, your Honor, it's a mix of utility -- when we talk about an NFT, it's a mix of utility and something else. I think it was your first question, or one of your first questions, when you asked about replacement of the image. The term MetaBirkin -- and I can get to if we discuss the history, but the term MetaBirkin was used to label the code prior to an association with any image. It's being used as a brand name, and the code are tokens. And you know what? NFTs, I think we all still struggle a little bit to give a real-world analogue, but it's a collectible, kind of like you brought up Aaron Judge, so I was thinking about baseball cards when you brought that up. It's kind of like a baseball card. I collected baseball cards as a kid and you had the cards, but we also had something that went along with the cards, so we could display our cards.

THE COURT: What went along with them, as I recall, was bubble gum.

MR. WARSHAVSKY: Well, you could have bubble gum. I was thinking about my collection. I didn't mean as a purchase. But I had a display, clear display where I could put the cards and put them in a leaflet. There were also little frames that I could put those cards in. The NFT is like those frames or the clear plastic sheets that you could put a card in. And then it has the card as well. In this case, I was a little surprised by my colleague's answer. The image could be changed at any time, and in fact, when these images were originally minted and sold, it was a shrouded object. That was all that was attached and it pointed to it, but at any given time that image could change.

What has the name MetaBirkins is the token, so the frame. And I would point to undisputed fact -- I might not have brought it up with me -- I think it was 56, where we say that Mr. Rothschild has changed the image and he could change it at any time he wants to. So it's not just the name for that little picture; it's also the name for the NFT, the utility itself.

But in addition to that, what we argue is that the term MetaBirkins is used as a brand. It's not just used as a name for an artwork. It's used as a name for a brand, and I can go through -- part of that then bleeds into the second

part, the second step here, the adoption and the explicit misleadingness. But I would start by saying I recognize that perhaps those little images might qualify as works of art. I think if Dr. Gopnik testified to ultimate facts for the jury, I don't think that's appropriate. Dr. Gopnik also said causing confusion also is art and that running a restaurant is art and a business contract is art. So the fact that he says NFTs are art doesn't come as much of a shock. I just don't think it's very persuasive.

He does say it, but it is rebutted. There was no rebuttal, of course, because Dr. Gopnik's report was submitted as a rebuttal report. But we've submitted plenty of evidence calling into question much of Dr. Gopnik's opinions and testimony, but I don't know that that gets us very far, because there are still the second and third elements of *Rogers*, which I'm happy to get into. Or I can pull back. Which?

THE COURT: No. I have some more questions about your first item, but I think we should move to the other two, and we'll come back.

MR. WARSHAVSKY: OK.

Your Honor, I think I would want, and it's going to be a bit long, but I'd like to address the second element, really, which is the artistic relevance, and that's where I think we have several facts which I'd like to get to. And I think to do that, I think we pull back a little bit, because I think we

have to look at who the defendant is and his intent through it. Yes, you said we accused him of wanting to make a buck, and we did. But we accused him of more than that.

THE COURT: His own words were make a bag, but as I understand it, that's slang for make a lot of money.

MR. WARSHAVSKY: He said plenty, and I'll get to some of that, if you like. But if we even take a step back, what is Mr. Rothschild, when he testifies that he's an artist? Because that's what counsel spoke about. And there, I point to exhibit 117, and if you'd like, I'd be happy to give a copy to you and to counsel. It's in our papers. But Mr. Rothschild's first foray into art was taking a Champion T-shirt and printing the names of colleges, including Parsons. And he got a cease and desist letter from Parsons. In his mind, though, that was art. I would say that's pure infringing. I would say that's no different than anything a few blocks from here where people sell Rolexes or other fake goods. He says it's art. Maybe there is some creativity. Maybe it requires some skill.

THE COURT: The images are not identical to anything that Hermès produces or sells. They're covered with this fur.

MR. WARSHAVSKY: OK. You're a step ahead of where I was going to, but I'm happy to get there.

THE COURT: Whatever you prefer.

MR. WARSHAVSKY: Well, again, we're accusing the whole brand, and I want to make sure that that's not confused. I

know the defendant would like it if we sued for a picture. We're not. We're suing for the use of the name MetaBirkins, and I think in that regard, I want to start, perhaps, with Mr. Rothschild's statements themselves. Right?

When he commenced this project, what did he call it? He called it Birkin. Right? And there is, he first told a friend and it's paragraph 197. It's an undisputed fact. He first told his friend he expected to take a nice 16- to 17,000 off of the Birkins, period. Right? To entice the designer, the person that actually created these images, to generate these images, he said he had an offer of 36,000 for 50 bags but he thought he could get it to a hundred thousand for a hundred of them, and he doesn't dispute that. He says he wanted to print money. But then --

THE COURT: Maybe I'm not totally following your point. The reason a purchaser would purchase one of these NFTs was not so they could own the brand. It was so they could own the underlying image.

MR. WARSHAVSKY: Actually, that's not even clear from the evidence we submitted, your Honor. You could see that some people actually thought and wrote on social media they thought they were getting a bag as well, thought they were getting a real live bag.

THE COURT: All right, but they certainly didn't think they were just getting the words MetaBirkins. That wasn't what

they did purchase.

MR. WARSHAVSKY: No. They were purchasing something from a brand. Birkin is -- and I realize I'm hopscotching around a little bit, because I have when I deal with this, but Birkin is one of the best known trademarks there is. Right?

THE COURT: I gather that. I have no expertise, but it is true that my wife told me that she was very disappointed that some of the bags had not been marked as exhibits in this case.

MR. WARSHAVSKY: I'm not going to touch that, your Honor. But I think the evidence is clear that there was over $300 million in advertising over the last decade. The name has been in exclusive use by Hermès for the last 30 years. Sales each year over the last ten years have been at least a hundred million in the U.S. alone, and there's unsolicited media coverage. Whether you look at Page Six or television shows, the Birkin is the most iconic -- and you don't have to take my word for it; you could take Mr. Rothschild's word that there was nothing more iconic than the Birkin bag; it was the holy grail of the internet.

So Birkin is a brand. So when we talk about what people thought they were getting, our complaint wasn't about what people necessarily thought they were getting, whether it was code or it was a picture or something. It was that they thought it was from Hermès. That's why this is a trademark

suit. Right? And it's about using it and creating a brand around Birkin. And I want to start with what Mr. Rothschild said.

THE COURT: On that theory, as I understand it, both from what you're saying now and from your brief, I don't even have to reach the artistic expression issue, right, if you're right about that?

MR. WARSHAVSKY: Well, if I'm right about that, I think that's correct. But I think we can still hit those points, because I think the second and third points of *Rogers* still bend heavily our way.

THE COURT: All right.

MR. WARSHAVSKY: And where I would start, again, using Mr. Rothschild's own words, in paragraph 176 of the undisputed facts, Mr. Rothschild is telling two potential investors I don't think people realize how much you can get away with in art by saying in the style of. He's suggesting he can get away with something. And as your Honor knows from the motion to dismiss and our submissions, even after this whole thing started, he kept saying he was inspired by Hermès, that it was a tribute to Hermès. But I would submit it was much more than just an inspiration or inspired by.

We have Mr. Rothschild, when he starts the project, referring to it as Birkins. On October 19, 2021, he told Mr. Burden, the person that created these designs, that, quote,

he might get some help from Hermès themselves. That's at paragraph 172, undisputed.

On October 24, 2021, Mr. Rothschild told his business partner, Eric Ramirez, that he was negotiating with Hermès right now. That's paragraph 173, undisputed.

On October 28, 2021, he told his friend, Aaron Maretzki, that he was doing a new set of Birkin NFTs and pushing to make it official with Hermès. Paragraph 174, all undisputed.

He was telling everybody what? That he was going to be doing something with Hermès and he was doing a Birkin project. Nothing about inspiration, knowing about art. He was looking to make money. He was looking to make Birkin NFTs.

In opposing summary judgment now, for the very first time, Mr. Rothschild says he was talking to a previously undisclosed CEO who was going to help him reach out to Hermès and this was just puffery. We still don't know the name of this mystery person. It wasn't identified in initial disclosures.

THE COURT: Yes, but I'm not totally sure what that proves in terms of any of the real issues. If I understand your argument, Mr. Rothschild develops these images of fur-covered Birkin bags and he believes that he can get Hermès to join with him in the sale because the NFT market is hot, or whatever, and they say no, not interested, or maybe say we want

to do our own, and so he goes ahead and markets his own. If, in fact, the issue is whether the underlying images have artistic expression, why does that history matter?

MR. WARSHAVSKY: Because of the second prong, your Honor. Again, in denying the motion to dismiss, your Honor explained the artistic relevance inquiry, and I'm going to quote from your opinion: "The artistic relevance prong ensures that the defendant intended an artistic -- *i.e.*, noncommercial -- association with the plaintiff's mark as opposed to one in which the defendant intends to associate with a mark, to exploit the mark's popularity and goodwill." And I would submit, your Honor, that in that question you just asked me, you're already assuming that he's looking at it as a business venture to trade off on an iconic mark. And the problem is we're also assuming that he was having those negotiations with Hermès. I would suggest to you he never did. This was an individual who hasn't been identified to your Honor or us or anybody else and is in, at the same time -- well, let's take a step back.

Why would Mr. Rothschild suggest he was having a discussion with Hermès if he wasn't? It is obviously because he knows that the word Birkin is associated with Hermès, as everybody knows. He is using their trademark. At that time he just says Birkin and at that time he's talking to -- one of the quotes I gave to you, he was talking to the designer. So he

didn't have a product to go give. He wanted to make something that looked like a Birkin, and I'll get to it in a moment, but -- well, I may as well say it here.

To make the product, what did he give the designer, the person that created these images? He gave a schematic of Hermès's Birkin bag. That's a schematic. The Birkin bag is not -- sorry. I'm stumbling over my words a bit. The name Birkin isn't the only intellectual property of Hermès that's protected here. The Birkin bag shape, its trade dress, is also federally registered and incontestable, and he turned and gave that to his designer while suggesting that he might be doing something with Hermès.

Now, if Mr. Rothschild's statement is to be believed, that he was actually having these discussions with this mystery CEO who worked at a fashion house, what would that -- and again, I don't know if it happened, but anybody who is a CEO of a fashion house knows that the only thing a fashion house really has is its intellectual property. And if this mystery CEO was really negotiating on Mr. Rothschild's behalf, the first thing this mystery CEO would say is you'd better get a license before you use Birkin, because that's what any fashion house would say. This court is flooded with those kinds of lawsuits. I'm sure you know them better than I do.

But second, let's say Mr. Rothschild and the mystery CEO were negotiating with Hermès and that leads into the

question you asked me earlier. If they were trying to have that discussion, it shows that they understand one of two things: either that Hermès wouldn't want this to be -- you know, would require a license or wouldn't want somebody trading with their Birkin name; or that he was looking for a commercial project, that he was looking at this as commercial. He was adopting it for commercial, again, going to that second prong, using it in a noncommercial way. That's the only reason to reach out to Hermès.

And I think we then have to go to some of the other -- we don't have to speculate on some of this. I mean even though we don't know the mystery CEO, we don't have to speculate, because a few weeks later, on November 12, 2021, an acquaintance asked Mr. Rothschild whether there would potentially be any legal issues with doing his Birkin NFT. Again, that was still what it was called, Birkin NFT. And Mr. Rothschild responded that "a cease and desist would help, TBH LOL" -- TBH, meaning to be honest; LOL, laugh out loud. So we know that at least as of November 12, 2021, a few weeks before minting, Mr. Rothschild was already talking about the fact and joking with friends that Hermès was going to be unhappy and he might get a cease and desist.

And then on December 1, 2021, about three weeks later, the day before the MetaBirkins were minted, Mr. Rothschild wrote in a text to colleagues, we need to make a push for a

push with Hermès. That's paragraph 175 of the undisputed facts. And in that same text, Mr. Rothschild didn't refer to the mystery CEO. At that point he said he had a connection with someone at Vogue, who had a direct line to Hermès. And like the mystery CEO, we don't know who it was, never identified in this case, but we'll leave that for the moment.

Three days later, December 4, the day after the MetaBirkins are finished printing, Mr. Rothschild wrote a text to Truman Sacks and Allan Sacks, potential investors, that he was trying to negotiate with Hermès through Sotheby's. That's at paragraph 177, undisputed. Again, like the mystery CEO, like the person at Vogue, we don't know who any of these people are.

So we have a few options here. In our papers we show that Mr. Rothschild has a habit --

THE COURT: All of this goes to what was in his mind, his intent, which, as you say, is one of the prongs. Classically that has not been something that can be resolved on summary judgment. If I recall correctly, in this very case, even before he got a cease and desist letter, he put on the website we're not related to Hermès, or something to that effect, and when there were articles in that well-known source of fashion expertise, The New York Post, suggesting that there was a relationship with Hermès, he had contacted them and various magazines to say no, it's not. So why isn't this a

jury question, the question of what was in his mind?

MR. WARSHAVSKY: All of what you've alluded to, those facts are all post-sale. The disclaimer is post-sale. And I'm sorry. I might have to ask one of my colleagues or -- I thought that the disclaimer is post-cease and desist letter.

THE COURT: Maybe. I could be wrong.

MR. WARSHAVSKY: And post-sale, so if he knew he was going to get the cease and desist --

THE COURT: Let's assume it was afterwards -- and I don't actually recall one way or the other -- you would say oh, this was just covering up afterwards because he got this letter and he had to worry about action might be taken. But he might argue, no, that that was is perfectly sincere and I was so glad to reach out to the Post and to the various magazines to make sure they understood that they got it wrong, why isn't that, again, a classic jury question?

MR. WARSHAVSKY: Well, I think, your Honor, I go back to what the second prong looks at, which is was his adoption of the name for noncommercial reasons? And I think all the objective manifestations of that subjective intent showed that this was about making money and trading off on Hermès's goodwill. Right? So we see what he says at the time. Could he now testify to contradict that? Perhaps. But what he's really shrouded himself in is that it's not a brand and that he's an artist. Right?

THE COURT: It's not a question of what he would testify to now, because I have to take the record as it is before me, but I do have to, on your motion, take every reasonable inference in his favor, and vice versa on their motion.

MR. WARSHAVSKY: Right.

THE COURT: So my question is, isn't it a reasonable inference that the lengths he went to to disassociate himself from Hermès show that he did not have the particular motivation that you're ascribing to him?

MR. WARSHAVSKY: No, because he did it post-sale. Right? This test talks about the adoption and even the *Polaroid* factor talks about the adoption. And at the time he was adopting the mark, he was trading -- we have text after text of him trying to trade off on that Birkin name. Right? The fact that post-sale, after he made his money and got a cease and desist letter from Hermès, he tried to correct, after collecting, that's not -- the test isn't is he a good or bad guy for all time? The test is when he adopted the mark, was he trying to trade off on Hermès's goodwill?

And here, I think all the evidence points in one direction. In fact, if you read through Dr. Gopnik's report, which, again, I think, is rife with problems, and I think we point that out, Dr. Gopnik almost suggests that Mr. Rothschild has to create that image. Right? And I think that

Mr. Rothschild, in discussing, I think if we look at his acts, what good faith basis is there for taking a federally registered trade dress and taking the schematic of a Birkin bag and saying, to make a design based on it and then calling it a Birkin? And then he teases it, you know, and let's talk about this brand name for a minute.

This brand name, MetaBirkins -- he was calling it Birkin for a while. We have produced here, your Honor, in there, when he posts, when he teased one image and said he's creating one-of-a-kind Birkins for a sale, there's no question that that's Hermès's mark and uses Hermès's design to make it look like Hermès -- an Hermès Birkin bag I mean -- and he teased it and said, whoever comes up with the best name, I'll give a free NFT. One submission said MetaBirkin. Another said Not Your Mom's Birkin.

Now, he said at his deposition that he used both of those. Right? He used both MetaBirkins, from one submission, and he used Not Your Mother's. He didn't use Not Your Mom's; he used Not Your Mother's. In his deposition, Mr. Rothschild said, oh, but I came up with that ahead of time. So if we're to believe Mr. Rothschild's testimony that he came up with MetaBirkins ahead of time, then it means that he teased it as a Birkin and called it a Birkin and teased it that way to gain interest. Right?

If we don't believe Mr. Rothschild's testimony -- and

in fact, this woman who first -- I think it's a woman -- who came up with the MetaBirkin name, actually came up with it, then Mr. Rothschild didn't even pick the name himself. Right? So it has nothing to do with -- it was somebody else who came up with it. So I would suggest, your Honor, that all the evidence here, regardless of which way -- you know, Mr. Rothschild -- a lot of his testimony is to contradict his documents at the time. Right? And he comes up to try and weave it together. But what I suggest to you is either way they have it, Mr. Rothschild was trying to profit off of the Birkin name and the Birkin image. And we know that not just from the statements that I was reading to you -- and we have more -- but we know it from his interviews, his interviews post-printing when he knew there might be an issue, his interview with Yahoo Finance, when he says there's nothing more iconic than a Birkin bag and he's trying to create the same thing.

More important, in both the Yahoo Finance article and in the Financial Times article, what does Mr. Rothschild say? He says people are now trying to counterfeit his MetaBirkins. Right? That's what he says. People are out there counterfeiting his MetaBirkins, and they were doing it right around the same time.

Now, we asked for evidence of that. We have not seen it. We showed the Financial Times and asked for evidence of

it. We haven't seen it. We believe Mr. Rothschild was doing it to burnish his own credibility, but even if he was telling the truth, he was talking to the press as though MetaBirkins was a brand. And if he was telling the truth, then he was upset that he was being counterfeited. How could he be counterfeited unless MetaBirkins was a brand and he was using it as a brand?

And so I think we can look at all those pieces of evidence. And again, the intent is not whether he's bad or good. The intent is whether it was a noncommercial purpose, and I think, here, that's unequivocal. I don't think there's any way for them to escape it.

THE COURT: All right.

MR. WARSHAVSKY: I'm happy to go also to the third factor.

THE COURT: Yes, you're on a roll. Go ahead.

MR. WARSHAVSKY: I wouldn't go that far, but OK.

The third factor, your Honor, then leads into explicit misleadingness, and I think we can show quite a bit. I think we've already established some, I think it's through the papers, but it points back to the *Polaroid* factors, and your Honor, in denying the motion to dismiss and denying defendant's motion for an interlocutory appeal, you cite that. You cite the *Twin Peaks* case, and I read the *Twin Peaks* case this morning, and I'd like to -- because I know the defendants say

we shouldn't look to the *Polaroid* factors. But I thought, your Honor, when you, I can't remember if it was in denying the motion. It was in one of your two decisions in this case. You said *Twin Peaks* emphasizes that the relevant question is whether the defendant's use of the mark is misleading in the sense that it induces members of the public to believe the allegedly infringing use was prepared or otherwise authorized by plaintiff. Under the *Rogers* balancing test, the Court should consider the *Polaroid* factors to determine whether the likelihood of confusion analysis is sufficiently compelling to outweigh the public interest in free expression. And I'd like to first turn to the *Twin Peaks* case, because I think it's a helpful case to think about.

The *Twin Peaks* case, there was a famous TV show, if you remember, from the late '80s or early '90s called Twin Peaks, and there was a book that came out. It was a 128-page book called *Welcome to Twin Peaks*. Judge Martin issued a ruling, finding copyright infringement and trademark infringement. The Second Circuit vacated the trademark infringement because Judge Martin, among other things, didn't go through the *Polaroid* factors.

But what the Second Circuit looked at instead of just saying, well, *Rogers* makes this an expressive work, discussed the work a little bit. It was 128-page book with seven chapters about the TV show. The first chapter was about the

popularity of the show. The second was about the characters of the show; the third, the photos -- the plots from episodes and commentary; the fourth and fifth were about David Lynch and Mark Frost and the setting. The sixth chapter was about the music from the show. The last chapter was about trivia. Both the front and back of the book had disclaimers, by Penguin Publishing, a notable publisher. And the Second Circuit remanded. I'm just going to read what the Second Circuit said when it remanded.

It said: "The special consideration bearing on the book's title concerns the wording and appearance of the title. The title not only uses the name Twin Peaks but precedes the name with the phrase 'welcome to.' The title thus copies a legend that appears on a roadside sign in the introduction sequence of each televised episode. Moreover, the book title is presented against the backdrop that appears to be a wooden slab, apparently an attempt to evoke the wooden roadside sign. It's a fair question whether a title that might otherwise be permissible under *Rogers* violates the Lanham Act when displayed in a manner that conjures up a visual image prominently associated with the work bearing a mark that was copied."

Right? Here, we say they don't even get to the third prong. But if they do, it is beyond ken that Mr. Rothschild used the MetaBirkin name next to an image that was meant to be a Birkin bag, and it was copied from a Birkin bag, and he

admitted he tried to recreate it and he admitted that he tried to make something that looked like it, and he succeeded. And not just The New York Post, which far be it for me to defend The New York Post --

THE COURT: I'm not critical of the New York Post.

MR. WARSHAVSKY: I like the sports section.

THE COURT: I think anyone who reads The New York Times and The Wall Street Journal ought to temper that by reading The New York Post.

MR. WARSHAVSKY: Certainly the sports section.

THE COURT: For sure.

MR. WARSHAVSKY: But it was also Elle magazine. It was French -- there was an intellectual property attorney. You might not think much of us, but intellectual property attorneys were confused. Individuals were confused. Everybody saw it this way. And then if you read Dr. Gopnik's report, he even suggests that this is part of the goal.

And my colleague just handed me -- the disclaimer was post sale, post cease and desist and only on a website that didn't facilitate the sales. And Rothschild admits that in his undisputed facts, paragraph No. 27, just to go back to that.

But going back to *Twin Peaks* and analogizing it here, your Honor, here, we know why the name was chosen. Here, it's not a book. It's something that's meant to emulate the Birkin bag, and it's sold right next to it. So I don't think

Mr. Rothschild can escape that.

Then the third element, of course, goes to the well-known *Polaroid* factors, and I don't think that for the most part the defendants disagree with some of those. And those are -- I just want to make sure I get them right here. Sorry, your Honor.

The strength of the Birkin mark, that's admitted.

The similarity of the marks, your Honor can look. One is Birkin. One is MetaBirkins. We've cited in the brief to Prof. McCarthy's treatise, adding a descriptive term or a generic term to an existing trademark doesn't move you away from similarity.

Similarity of the products or services, I might put a pin in that for a moment.

Likely -- well, similarity of the products and services and the likelihood that the senior user will bridge the gap, I'd like to talk about those two together, because it's very hard in a nascent industry like the metaverse and NFTs to really describe how close the goods are. We have quoted testimony here from -- not testimony. I'm sorry. We've quoted texts from Mr. Rothschild to business partners, and he said the MetaBirkin images are fully metaverse ready and totally 3D. The software used to create those images was Houdini. In their current form, they're definitely two dimensional, as Mr. Millsaps stated. However, I would submit

that in that text chain and even in disputing the -- well, in his response, the undisputed facts, Mr. Rothschild says, well, they would look clunky. That doesn't mean they're not metaverse ready. They are. Is a virtual handbag or a picture of a handbag the same as a real handbag? I think that's a tough question in the nascent industry, but I think the next factor, the likelihood of bridging the gap makes it a nonissue.

Mr. Rothschild testified and a few of the experts said all fashion brands are going into the metaverse -- Gucci, Chanel, Adidas, Nike, Mr. Rothschild. Hermès itself has been working on NFT projects, not necessarily the same one, but certainly to -- actually realized one such product. It was more of a gated, ticket event of the type Mr. Millsaps was referring to, but it was already in that space and all the brands are going. So the likelihood, No. 4, if we look at three and four together, then I think it's clear that those both weigh in Hermès's favor.

And I think if we go back to the similarity of uses, there is testimony about wearability. I think both parties went down that road a little bit based on, I think it's footnote 3 in your Honor's motion to dismiss, where you say, well, if it's wearable, that may change the analysis. What I would submit, your Honor, is if it's useable it should change the analysis.

Mr. Martin, Hermès's 30(b)(6) witness, explained that

an Hermès bag, when you have a Birkin bag, it's not just putting it on your shoulder. You're making a statement when you put it, for example, on a table in front of you, like any other luxury item, when you put it as your picture in your Twitter profile or your Facebook profile or whatever you may use. And in that sense the MetaBirkin is used the same way. And so he looks at them as being similar already.

THE COURT: I'm not totally sure I follow all this, but I admit that my knowledge of the metaverse is limited. I don't understand, for example, how you could ever, in any way consistent with the English language, wear a MetaBirkin or carry a MetaBirkin.

MR. WARSHAVSKY: Well, I think that's why --

THE COURT: Now, if you're telling me that what has developed, and maybe it has, is something so far removed from reality that it carries out imaginary actions and they are somehow to be equated with real actions, OK. I'll have to remember that when I write my next opinion. I won't send it to the Second Circuit. I'll send it to the metaverse. But I understand that people do buy NFTs, apparently a lot of people buy them. I hope they're not using cryptocurrency. But it has a, if you will, value, an economic and mental value. But it's not like they think they're buying a physical bag. There's still that difference.

MR. WARSHAVSKY: That's right, and I don't think --

there were user comments that we submitted to your Honor where they thought they were also getting in addition a bag. They thought it came as part of a bag, because other brands do that. And in fact, Mr. Rothschild's now manager, when he was first talking to Mr. Rothschild -- again, we cite it in the papers -- Mr. Rothschild's manager thought that if you bought -- well, he asked Mr. Rothschild when I buy this, do I also get the bag?

Mr. Rothschild's response is telling.

THE COURT: That was really part of your evidence on the confusion element.

MR. WARSHAVSKY: Yes.

THE COURT: Not on what we're discussing now.

MR. WARSHAVSKY: No, not on usability. Yeah, and I think you've heard me struggle with trying to say how similar are the goods. Right? I think it's very hard to talk about virtual goods and real-world goods and compare them and talk about similarity, and that's why I was combining that with the likelihood, the fourth *Polaroid* factor, which is whether the senior user is likely to bridge the gap. Right? And in that sense, I think even the statements of defendant's experts support that. But you could take Mr. Rothschild's testimony, you could take other testimony, which says that brands have already entered the metaverse and they have created NFTs. There are NFT projects by all the big brands. They do try to push out into virtual reality, sometimes they're spectacular

failures, and they do use NFTs.

So that's why we look at similarity of the products and services and bridging the gap together, because I think that those two -- in some cases they don't necessarily go together, but I think here they do because the virtual reality or the metaverse or NFT representations are meant to emulate the real-world product. Right? If you're going to have a bag as your display, it's meant to look like a real bag. Right? Now, of course, you're not going to put your keys -- I mean it's virtual. You're not going to put your keys in it. You're not going to put your wallet. You're not going to put your brief. You can't.

However, we did submit, just for thoroughness, we did submit a video of somebody who -- I don't think it's still there, do you -- of somebody actually creating TikToks showing what they're putting in and taking out of their MetaBirkin, much the way they would a Birkin, and they took out a bottle of vodka and a book, things like that. So that's why I'm combining those two together.

THE COURT: More like 64 home runs on the metaverse.

MR. WARSHAVSKY: Right now, I think there's 63.

Mr. Rothschild's intent, the fifth factor, I think we've discussed that. I don't think you want to hear more of that.

Evidence of actual confusion, again, I think you're

well aware of. You cited the article, but there were articles. There was confusion. We also submitted a survey which goes to the overall likelihood of confusion.

THE COURT: If I recall, now I have to refresh my own recollection here, but your survey showed that, the survey was administered to those who were likely to purchase NFTs for digital artwork, fashion apparel or fashion accessories, and confusion among that audience was 18.7 percent. But, among purchasers or potential purchasers of luxury handbags, the net confusion level is only 3.6 percent. So I'm not totally sure what you're asking me to infer from that survey.

MR. WARSHAVSKY: A higher number. You know, this is -- we're looking at how the potential purchasers of NFTs were confused. We've shown that, and I think the net confusion analysis, you know, we're looking at that, new markets. It's a nascent market, and that gets into the seventh and eighth factors, which I was going to get to. But those are the consumers. I don't know that people who are buying Birkin bags are always buying NFTs. I think it's probably a smaller percentage. So we looked at those and tried to emulate the circumstances under which --

THE COURT: Your boss has a note for you.

MR. WARSHAVSKY: OK. Thank you, because this really was helpful.

I think that the handbag was not relevant because the

survey was forward looking and based on Hermès's claim, and therefore, you look to the junior user's -- meaning Mr. Rothschild's -- use of the mark. And I think that's in our reply papers.

THE COURT: OK.

MR. WARSHAVSKY: But I must admit I had my notes on it, but we were looking forward.

Should I just get to the seventh and eighth factors?

THE COURT: Yes. Go ahead.

MR. WARSHAVSKY: OK, the seventh and eighth factors.

THE COURT: I do want to hear from your adversary.

MR. WARSHAVSKY: I know, and he's typing away. I know he has a lot to say.

The seventh and eighth factors are the sophistication of the purchasers and the quality of the defendant's goods.

When it comes to sophistication, this is a nascent industry. I think you can see from some of the questions that these aren't the most sophisticated. They are spending a lot of money. To answer your question earlier, you can only buy these NFTs with cryptocurrency. You can't buy it any other way, and depending on what ecosystem or what blockchain it's on, that would dictate what cryptocurrency you could use. And as we've seen over the last ten days or so, not that the crypto market but the NFT market has cratered. Why? Because what we see is that it's not the most sophisticated people going out

and purchasing. There aren't studies yet on the sophistication, but nonetheless, we would say that in a nascent industry like this, where most people don't really understand NFTs or how to use them or how to display them, that sophistication -- or that the price of the goods isn't all we would look at.

And likewise, the quality of the goods, your Honor, I must admit to you I don't know what to say.

THE COURT: Well, I'm not sure what you just said indicates, because if what you're saying, in effect, is that the unsophisticated purchasers are easily defrauded, of course, Hermès wants to get in on this market too, as I understand it.

MR. WARSHAVSKY: They do.

THE COURT: So that sounds like unclean hands to me.

MR. WARSHAVSKY: I don't know why that would. The quality of the products has nothing -- you know, the question about sophistication isn't about tricking customers or not tricking customers.

THE COURT: I know, but you were going beyond that, and you were saying -- maybe I misunderstood your point. You were saying that you inferred from the fact that this market had cratered that the people who originally invested in it were unsophisticated. Wasn't that your argument? Did I misunderstand?

MR. WARSHAVSKY: Well, it was part of it, yes. Really

what I said was it's a nascent industry.

THE COURT: I think the way one would express what you just said was they were suckers, they were duped, they were defrauded, and now they're being victimized. And maybe I'm reading too much into your argument.

MR. WARSHAVSKY: Well, I mean maybe the people who invested in FTX. I wouldn't suggest that -- this is trademark infringement. I'm saying the lack of sophistication allowed them to be confused as to source. It has nothing to do with being suckers or investing in bad schemes. But much like any time we talk about sophistication of consumers, in a trademark, it's one of the *Polaroid* factors, and the reason it's there is that if consumers are less sophisticated they don't recognize the difference between genuine and infringements, and so it's part of a likelihood of confusion analysis, not a question about clean hands or trying to profit off them.

THE COURT: All right.

MR. WARSHAVSKY: What I was suggesting was that what we see by dint of what's happened over the last few weeks is that the whole market cratered. I mean everybody cratered. I think that's a testimony to the lack of sophistication. I wouldn't suggest to you that everybody who's in that market by any stretch is a charlatan.

Going back to the proximity of the goods, one of my colleagues handed up to me that right now, and it's in

counterstatement paragraphs 49 to 51, that proximity of the goods is evidence that the USPTO is handling applications and denying NFT applications, finding them similar to physical goods. So the USPTO is looking at those goods as similar. Again, it's counterstatement paragraphs 49 to 51. I think we still struggle with that, between a virtual good and a real good, but at least one government body is looking at it that way.

I think I've hit all the *Polaroid* factors. I don't know if you have other questions.

THE COURT: I think we will interrupt you. We'll come back to you for more final comments later if you missed anything. But I think it's now time to hear from defense counsel.

MR. WARSHAVSKY: Thank you, your Honor.

THE COURT: Thank you.

MR. MILLSAPS: Thank you, your Honor.

It's kind of hard to know where to start because that was a blizzard of red herrings, and the actual legal issues --

THE COURT: Blizzard of red herrings? Boy, that's a difficult metaphor.

MR. MILLSAPS: Maybe. I hope I'm not being judged on that, my metaphors, your Honor.

So let's just go back to artistic relevance. OK? And your Honor was asking Mr. Warshavsky some questions about

Mr. Rothschild's intent.

The only, the only relevance of intent under *Rogers* is whether the defendant used the mark because the defendant solely intended to trade off of the goodwill of the mark. The *Rogers* cases are clear in that there was no relevance to the associated artwork. So using MetaBirkins as a mark to sell some good that is an artwork simply because the defendant is hoping that the name Birkin will catch people's attention and it has no artistic relevance to the artwork, that's where intent would come into play.

But there is no jury issue of intent because clearly the MetaBirkins artworks themselves are expressive works, which would be protected under the First Amendment. They are images of imaginary Birkin bags covered in goofy, garish fake fur. So once you have crossed that threshold question and you're reaching the question of artistic relevance, the threshold for artistic relevance, as your Honor noted in your opinion denying the motion to dismiss, is intended to be low and won't be satisfied unless the use has no artistic relevance to the underlying work whatsoever. That is an issue that the Court can decide by looking at the mark as it's being used in the title in relation to the artwork. And here, clearly, there's artistic relevance between the MetaBirkins title and the MetaBirkins images and art project as a whole.

The MetaBirkins images, as Hermès's own 30(b) witness

acknowledged, and was obliged to admit, is descriptive of what you see in the MetaBirkins images. They are fanciful depictions of imaginary, fur-covered Birkin bags. So there really in no question here that the MetaBirkins title is artistically relevant to the MetaBirkins artworks.

Now, my opposing counsel spent a lot of time discussing a lot of private statements by Mr. Rothschild to his colleagues, his associates, his friends in the process of thinking about and creating his MetaBirkins art project. Normally, those kinds of communications never come out into the public because those are the sorts of things that artists would have privately with their associates and with their friends. These are irrelevant statements under a *Rogers* analysis and, in this case, under a trademark case. Even under an ordinary trademark infringement case, it's black letter law that those are irrelevant statements because they were not made to the public. They weren't made to consumers or potential consumers of Birkin bags or MetaBirkins artworks and NFTs. And additionally, your Honor, you have the unrebutted expert testimony of Dr. Gopnik, who says clearly the MetaBirkins title is artistically relevant obviously for the same reason that Mr. Martin, Hermès's general counsel, acknowledged, because it is descriptive of what you see in the artwork, but it's additionally artistically relevant because the addition of meta, the prefix "meta," with Birkin signals to the viewer that

this is communicating something about the meta nature of the artistic experiment that Mr. Rothschild was conducting.

And let's talk about that artistic experiment for a minute because this is incredibly important in this case. My opposing counsel also spent a lot of time talking about how well-known the Birkin mark is, how famous and iconic it's become in the culture. That's a very important point in this case because a Hermès has admitted that the Birkin mark is not just a source identifier. Most trademarks simply function as source identifiers and people use them because they're trying to trade on their goodwill and enter a similar marketplace. But the Birkin mark here, it is undisputed, has transcended its role as a source identifier in our culture. It's undisputed that the Birkin mark has become a name that is synonymous with rarefied wealth; that through prolific references in pop culture -- I believe Beyoncé sings about it in one of her songs, people are often talking about Birkins in our culture because our culture is, for better or worse, obsessed with wealth and financial success.

And so the First Amendment interests in this case are quite severe when you have an artist who is commenting about a mark that has become a cultural object, that everyone else in the culture is referencing it, in pop culture references, songs, artwork, and those sorts of things.

THE COURT: I saw that also in your brief, and maybe

it was in your client's deposition. You were saying that this was more than just an artistic endeavor in the abstract. It was a political message?

MR. MILLSAPS: It was -- if you look at the record, your Honor, and I think this is unsurprising for most any artwork that's worth discussing. There wasn't just one message behind MetaBirkins. It was inspired, in part, by fashion's fur-free initiative. That's why Mr. Rothschild decided to cover the MetaBirkins in the, quote, goofy, garish fake fur, because in a sense, it was selling something that was covered in fur but not actually made from animals, and it was a nod to that.

On the website, Mr. Rothschild said this is a tribute to the iconic Birkin bag because artists often make tributes to things that they are interested in in the culture and that are widely talked about and looked at in the culture.

Mr. Rothschild also said in his Yahoo News interview, which your Honor, I believe, quoted in your opinion on the motion to dismiss and which was in the complaint, that he was seeking to do an experiment here with the MetaBirkins NFTs, and he has elaborated on that experiment in his testimony that's in the record, that he was investigating where the image, where the value lies in the Birkin. Is it in the actual, physical product that Hermès is selling, or is it in this image that has taken on a larger life of its own in our culture? And

Dr. Gopnik additionally explains that he understands MetaBirkins to be exploring that question in doing that. And so there are multiple angles and probably others.

THE COURT: You think that someone who purchased a MetaBirkin NFT was motivated, I'm going to expose the hollowness of wealth by spending my own money to purchase this MetaBirkin? That seems extraordinarily --

MR. MILLSAPS: Your Honor, that's not what we're saying or arguing here. That really doesn't have to do with the intention of the purchase of a MetaBirkin.

THE COURT: Well, I understand that, but you're saying that part of the motivation was to expose the materialism, overmaterialism of what is conveyed by the notion of owning a Birkin bag. But if that motivation is so concealed that when you look at the actual expression itself, the fur-covered Birkin bag and the way the public reacted to that -- namely, by purchasing it so they could brag to their friends that they got a Birkin bag -- it casts doubt on whether objectively that really could have been the motivation, that political message could have been part of the motivation of the artist.

MR. MILLSAPS: Your Honor, we're not arguing that the purchasers had that understanding or motivation, and I'm sorry if I haven't been clear here. The artist's motivation, what he experimented with here was to see what the culture would do with these things that he put out into the culture, which were

just two-dimensional depictions of, as Dr. Gopnik put it, goofy, garish fake fur-covered Birkin bags. And so the experimenting here was to see will the culture ascribe the kind of value to these artworks that it ascribes to an actual Birkin bags. That was the experiment, and the experiment seems to have been fulfilled. But that's what we're saying here. And the artist was saying, and also Dr. Gopnik as an expert in business art was saying, that's why he recognized this as a classic example of business art in the vein of Andy Warhol and other artists who have engaged with commerce in this way.

THE COURT: Now, of course, your client, if he's not being hypocritical, will now devote all his earnings from this to some charity for the poor.

MR. MILLSAPS: I'm afraid, your Honor, that my client is having to devote all of his earnings and more to this case, but my client does have other artistic projects that focus on climate change and other issues that are in the record, such as the "I Like You You're Weird" digital series that followed MetaBirkins and has nothing to do with MetaBirkins.

But you know, there's another issue here in this discussion, your Honor, that's important to talk about, and that is Hermès would very much like to draw a divider between art and commerce: Art is over here; commerce is over here; never the two shall meet. That is never how art has been in the history of art. Art has always been intertwined with

commerce. Artists are business people as well, whether they're running the business themselves, whether they have a gallery running it for the them or they have a manager doing it for them, artists are trying to sell something, just like everyone else. And additionally, on top of that there is business art, which is what Dr. Blake Gopnik is an expert in and what his report addresses here, and that is where artists deliberately engage with commerce, because they want to be provocative.

THE COURT: Look, those are all fair points. As I understood the argument being made by plaintiffs' counsel, it was that doesn't mean that someone who's just engaged purely in infringing a trademark for their own profit can pass it off as art, as business art, that the line needs to be drawn between those two situations. That's what I took to be his argument.

MR. MILLSAPS: Yes, your Honor, but we also have a case here where MetaBirkins are not the type of product that Hermès sells. We should get into this on the *Polaroid* factors, which we're very happy to walk through. But in terms of just the threshold question on *Rogers* about whether or not this is artistic -- or expressive content protected by the First Amendment, there's nothing in the record to dispute that. And on artistic relevance, it's an incredibly low bar, which says that unless --

THE COURT: Yes, I would agree with you. I wouldn't put the word "incredibly" in front of it, but it's a low bar.

But it's not zero, is the point. There still is a point beyond which trademark infringement cannot be covered up by a claim of artistic expression if there is no reasonable way it could be viewed as artistic expression and if the intent was never artistic expression. Now, you're pointing out why you think that's not the case here, and I understand that.

MR. MILLSAPS: Yes.

THE COURT: Yes.

MR. MILLSAPS: Yes, your Honor. I would wholly agree with your statement, and in this case obviously there is ample evidence that this is artistic expression in the record, and it is undisputed.

Additionally, my adversary said that Dr. Gopnik was acting as a rebuttal expert. Your Honor, I'm not sure why that's the case. Dr. Gopnik never purported to act as a rebuttal expert. Dr. Gopnik's report was submitted as one of defendant's --

THE COURT: I think his point was not well-taken there but I'll hear from him on that. It was rebuttal only in the sense that it followed after your expert's report, but that doesn't mean that he wasn't subject to deposition inquiry in which all these issues could be explored.

MR. MILLSAPS: Yes, your Honor.

I don't know if your Honor has any further questions on artistic relevance.

THE COURT: I haven't, and I'm not sure either of you want to spend much time on it, but there are claims in addition to the trademark claims, which are obviously central. There's dilution claims and there's something called cybersquatting. Every time I work out from now on, instead of actually squatting, I'm just going to cybersquat. But in any event, if you wanted to say anything about those, now would be a good time.

MR. MILLSAPS: Your Honor, before I do that, I do want to go through the *Polaroid* factors.

THE COURT: Oh, yes.

MR. MILLSAPS: And the explicit misleadingness prong, but I was curious if your Honor had any further questions about artistic relevance.

THE COURT: No. I understand what the arguments are about.

MR. MILLSAPS: OK. Then I'll get to those.

On explicit misleadingness, we certainly don't disagree that plaintiffs have submitted a voluminous record here of evidence. But this evidence shows that there is no genuine dispute here over whether Mr. Rothschild used the mark in an explicitly misleading way in connection with the MetaBirkins art project in this case.

As your Honor's well aware, our contention is that the Court need not apply the *Polaroid* factors in this case to look

at explicit misleadingness because *Rogers* itself did not apply those, and they were applied in *Twin Peaks* in the case of a title versus title dispute of two artistic works, and we don't believe that should apply here. But we're more than happy for the Court to apply the *Polaroid* factors in this case.

THE COURT: First of all, I think there is a real issue of whether they're applicable or not. I thought your papers were helpful in that regard, but let's assume for the sake of argument, because I certainly haven't resolved that or any other issue today, so go ahead and address that if you want.

MR. MILLSAPS: Thank you, your Honor.

As I said, we're actually happy for the Court to apply the *Polaroid* factors in this case if that is what the Court decides to do, because the undisputed evidence here shows that even if this were a normal trademark infringement case and did not involve a work protected by the First Amendment that would trigger *Rogers,* it's a borderline case.

I'd like to go to the survey first, if we could, because I think the survey is incredibly instructive here. As your Honor knows from our papers, Dr. Isaacson's survey was incredibly flawed and incredibly stacked in Hermès's favor, and actually, of course, there were two surveys, as your Honor pointed out. One of them was a survey of handbag purchasers or prospective handbag purchasers which showed a net confusion

level of 3.6 percent, which is undisputed shows no confusion among that market, Hermès's own market. Now, my adversary said, well, Dr. Isaacson didn't opine on that survey because it was a forward-looking survey and isn't relevant here. But it's curious that plaintiffs instructed Dr. Isaacson to conduct that survey, because they knew from the pleadings, their own pleadings, that it wouldn't be relevant under that theory. Yet they went ahead with it anyway, and Dr. Isaacson decided not to opine on it in his report for some reason.

The other report that he does opine on among NFT purchasers or prospective NFT purchasers actually shows inconclusively that summary judgment should be granted in Mr. Rothschild's favor in this case. He purported to find 18.7 percent confusion, which I'm sure that your Honor's well aware is a borderline confusion level in a normal trademark infringement case. Some courts don't find that to be sufficient confusion level -- anything below 20 percent. But as your Honor also is aware, in applying a quick look at the *Polaroid* factors, as courts do when they're applying *Rogers*, the plaintiffs have to show a particularly compelling level of likelihood of confusion, and there can be no question here that purported net confusion level of 18.7 percent would not rise to the particularly compelling level that would be necessary here. Your Honor can compare the level that Dr. Isaacson reports here to the level of confusion or the survey results that the *Rogers*

court itself looked at, where the *Rogers* court swept aside a survey that showed 38 percent of respondents thought that Ginger Rogers was somehow involved with the film at issue in that case.

Now, that was not a 38 percent confusion level, as the plaintiffs point out in their papers, but it is the same kind of question that Dr. Isaacson himself was looking at with his survey, because Dr. Isaacson repeatedly testified at his deposition, although he said he was measuring confusion it turns out he wasn't actually measuring confusion in a way that matters in a trademark case, where confusion means the respondents were actually confused about the source of the goods. Dr. Isaacson repeatedly testified that he was testing for cognitive connection between the test stimulus, which was the MetaBirkins web page, and Hermès. And cognitive connection is essentially what the survey in *Rogers* found 38 percent of, and the court disregarded that. And so we're very happy for the Court to look at the survey here and to apply the *Polaroid* factors, because the evidence shows inconclusively there's no genuine dispute here.

Additionally, that's if the Court were to give plaintiffs full credit for Dr. Isaacson's survey figure there, 18.7 percent. As we pointed out in our papers, Dr. Isaacson's survey is based on a cascade of errors that strongly stack the survey in plaintiffs' favor here. At the core of it, the

survey showed respondents a test stimulus that showed them the MetaBirkins web page, which had an image of MetaBirkin, which, of course, is a digital artwork that depicts a fanciful handbag and the question Dr. Isaacson asked respondents was do you know who makes the item shown on the web page?

Well, any reasonable respondent is going to look at that and say, and wonder, do they mean the bag, the person who makes the bag that's depicted in the artwork, or do they mean the artwork itself? And so our rebuttal report by Dr. Neal makes quite clear as well why that's a problem. And Dr. Neal also goes on to explain that there's a glaring coding error made by Dr. Isaacson, which probably results from the fact that he wasn't actually measuring confusion in the traditional trademark confusion sense, but he was measuring cognitive connections, as he testified, because, for instance, he coded this response as confused in his survey, as part of that confusion level of 18.7 percent. This was a question to response ID18 wrote: The web page name and description states it's MetaBirkins, but also the web page disclaimer at the bottom clearly states that the author of the post, or NFT, is not affiliated with Hermès, who is the actual registered trademark owner of Birkin bags.

Despite the respondent writing this, Dr. Isaacson nonetheless coded this person as confused. So the survey here is rife with fatal errors, but even if the Court overlooks all

those errors, the 18.7 percent that Dr. Isaacson arrives at is insufficient as a matter of law under a quick look at the *Polaroid* analysis to show confusion.

The other *Polaroid* factors here -- the strength of the plaintiffs' mark, well, we talked about that just a moment ago. The strength of the plaintiff's mark is why so many people in the culture are talking about it and referencing it and making art about it -- because it's become iconic in the culture. Rather than being evidence of confusion, in fact, the strength of the mark in this particular case makes it more likely that Mr. Rothschild's MetaBirkins will be recognizable by consumers as art and not be attributed by consumers to Hermès, and the Court can look at various cases for that, such as *Louis Vuitton Malletier v. Haute Diggity Dog* and *Girl Scouts of U.S. v. Bantam Doubleday Publishing Group*, which ruled that consumers can recognize small differences when dealing with extremely strong marks in the context of a book series. Certainly the survey evidence that we just talked about showed that consumers or prospective consumers of Birkin bags or the NFTs understood, were not confused at a particularly compelling level and borderline at a level that would even be sufficient in a normal trademark infringement case.

If we look at the similarity of the marks, the MetaBirkins obviously and necessarily evoke the Birkin bag. They're conspicuously not reproductions of Birkin bags. They

are fanciful depictions covered in goofy, garish fake fur that run contrary to Hermès's elegant image. The MetaBirkins name is not the same as Birkin. It adds the prefix "meta," which has artistic relevance, as I discussed earlier with your Honor. And other cases involving *Rogers*, such as *AM General*, the case involving the use of Humvee in a video game, where the Court found that to be protected by *Rogers*, notes that when the marks are used for different purposes, the marks are not similar. And in this case, of course, the marks are being used for different purposes. Birkin is used to sell luxury handbags, physical handbags. Mr. Rothschild was using the mark to sell digital artworks connected to NFTs in this case.

If we look at the proximity of the products, despite Hermès's early attempts -- and it's interesting because my adversary now concedes that Hermès is not suing on the images here. My adversary now says they're suing on the use of the name, the MetaBirkins mark, which is quite a turnabout in the case from the complaint and the motion to dismiss. Your Honor will recall that Hermès attempted from the beginning to characterize the MetaBirkins as digital knock-offs, and the MetaBirkins artworks here are not handbags. There's no proximity. They're no more proximate to handbags than the image of a painted pipe is to the market for pipes.

And this, by the way, is also shown by Dr. Isaacson. If you look at the fact that Dr. Isaacson surveyed handbags or

prospective handbag purchasers and there was no confusion there, and he found what he purports to be an 18.7 net confusion level among NFT purchasers, the differential right there is an indication that the proximity-of-the-products factor would weigh in Mr. Rothschild's favor on a *Polaroid* analysis.

Then there's the likelihood of bridging of the gap, and Mr. Warshavsky was up here discussing Hermès's intent to enter the NFT market, which there is evidence in the record for. I cannot speak openly here about the evidence of that. That was Mr. Martin, their 30(b)(6) witness's testimony; it's filed under seal. But I would point out to your Honor that if your Honor reads that, your Honor will find that Hermès has expressed no intent to enter the NFT art market in the way that Mr. Rothschild has sold NFT artwork here, nor does Hermès even express an intent to enter a market where they'll be selling virtually wearable fashion items in the digital metaverse. So the likelihood of bridging-the-gap factor here would not weigh in Hermès's favor in that sense.

And moreover, even if Hermès were intending to enter the market, Hermès still cannot control artistic references to Hermès's branded products. Your Honor can look at a plethora of *Rogers* cases, such as *AM General*, where Humvee was known to license the Humvee mark for toys and games and things like that, and the court nonetheless found that *Rogers* applies and

protected Activision's use of the Humvee depiction in its video games despite the fact that it arguably was taking away a market opportunity from Humvee, where it could license that mark. Of course, every brand would like to control every reference to it in the public. There's no dispute about that. Of course, Hermès would like to control every reference, and Hermès would like to have a licensing opportunity any time that its brand is used or referenced, but that's not the law in our country and that's why we have *Rogers* and why we have the First Amendment, particularly when we live in a culture and an era where we are bombarded daily by brands, everywhere we turn and everywhere we look, and they define in many ways life these days and take up so much space in our minds; it's not surprising that we have artists like Mr. Rothschild, who are engaging with these brands and who are seeking to comment on them in various ways.

If we move on to the actual confusion prong of *Polaroid*, we just discussed the survey and why that shows that we win under that prong, particularly because the Court, under *Rogers,* must apply, in doing a quick *Polaroid* look must apply a particularly compelling standard here.

The other evidence that Hermès points to in the record for actual confusion is not actually evidence of actual confusion. Hermès points to the many statements made by Mr. Rothschild privately to his associates and his friends

about, you know, his creation of the MetaBirkins artworks, how he said that he was making Birkin, you know, NFTs for a time before he had chosen a title. All of that is irrelevant. It is not evidence of confusion.

I should say at the top that there is no evidence in the record, not a piece of evidence in the record, that shows that any actual purchaser or prospective purchaser of the MetaBirkins artworks or NFTs was ever confused. There is not a piece of evidence for that. What Hermès wants the Court to look at are these private statements to Hermès's associates and friends, which, as a matter of law, even in an ordinary trademark infringement case, do not constitute evidence of confusion.

Hermès also has submitted a handful of social media posts, which Mr. Warshavsky characterized as showing that people were confused about whether or not they would be receiving a Birkin bag, or whatnot. If your Honor looks at the actual social media posts, and I would be happy to discuss any of them in particular if the Court has any questions, but I can tell your Honor that that body of evidence does not show what Hermès says that it shows. It shows unidentified individuals making comments on the various MetaBirkins.

THE COURT: I think I have that from your brief.

MR. MILLSAPS: Yes.

THE COURT: And with apologies, because I want to give

you the same full time that I gave your adversary, I do have two other matters here this afternoon, which I would like to turn to by 4 o'clock, anyway.

MR. MILLSAPS: OK, your Honor. I'll move on to just the final two prongs, the good faith prong.

THE COURT: Yes.

MR. MILLSAPS: So, it's undisputed in the record that Mr. Rothschild, wherever he could, made clear who the source of MetaBirkins was. The website made clear that Mr. Rothschild was the creator of MetaBirkins. The social media pages either said that they were created by Mr. Rothschild, or in the case of his Instagram page they tagged his personal Instagram handle @MasonRothschild, which, on Instagram, is a way of people indicating when they've created something in the way that an author would sign a painting, for instance. It's the signature that leads people back to his individual page.

There's evidence in the record showing that Mr. Rothschild attempted to correct mistaken journalists, was reaching out. There's no evidence here that Mr. Rothschild was using the mark in a bad faith way. Dr. Gopnik's unrebutted testimony also goes to the good faith of Mr. Rothschild's use of the work here, which was to describe the visual artworks that he created and was putting out into the world with the NFTs.

The quality of the art here should not really be a

factor because it's not really the Court's purview to be judging the quality of artwork and whatnot, but I will note that plaintiffs put into the record --

THE COURT: I know that's quite a shame, but --

MR. MILLSAPS: Yes.

Plaintiffs put into the record evidence that Mr. Rothschild was trying to make images quickly. There is also evidence in the record showing that Mr. Rothschild was very concerned about getting the fake fur right, for instance, and that was difficult for the assistant that he was working with to help him generate those images. But nonetheless, again, this really shouldn't be a factor in this case given that we're talking about artwork.

And then on the final point, consumer sophistication, my adversary talked a lot about how NFTs are a nascent industry and market and consumers are kind of naïve and all of this. First of all, there's no record, there's no evidence in the record for this, and my adversary acknowledges that, but more importantly, courts in trademark cases, it's an issue of black letter law -- that when the value of a particular product goes above a certain threshold courts then assume that a reasonable consumer would become educated about what they're buying. And in this case, and courts have found that for products that, there are $250 sneakers courts have found that over. This is a case that's involving artworks and NFT artworks that cost

thousands of dollars to tens of thousands of dollars and handbags that cost thousands of dollars to over a hundred thousand dollar, and so it's black letter law here that the consumer sophistication prong of the *Polaroid* analysis would weigh in Mr. Rothschild's favor here. And in fact, Dr. Isaacson's survey evidence confirms that, because if people were more confused and if Mr. Rothschild were actually being explicitly misleading about the source of MetaBirkins, we would expect to find a lot more consumer confusion in Dr. Isaacson's surveys, which barely even reach an arguable threshold in a normal trademark case.

THE COURT: All right. With apologies, I need to cut you off. I want to give your adversary five minutes to very briefly respond.

MR. MILLSAPS: Thank you, your Honor.

THE COURT: Thank you very much.

MR. WARSHAVSKY: Your Honor, five minutes is hardly enough, but I'll do what I can. There was a lot that was said, and a lot is, frankly, demonstrably false and, frankly, a little disappointing.

THE COURT: Well, I recognize that the attorneys for both sides are being paid by the hour, but nevertheless, five minutes it is.

MR. WARSHAVSKY: Fair enough, your Honor.

Let's just talk about survey numbers for one minute.

Mr. Millsaps keeps saying that the *Rogers* court said 38 percent wasn't enough. Actually, in the *Rogers* case, if you look at footnote 8, and that's at 875 F.2d 1001, it was 14 percent and actually the court said it was enough. And if we look, your Honor, at your case, *Energy Brands v. Beverage Marketing*, 17 percent net confusion was enough.

If we look at the undisputed facts here, what's clear is that Dr. Isaacson applied the *Eveready* method, which is exactly what's required in this circuit, and you can go through it, you know, the overriding theme seems to be that Hermès is trying to bully and stop speech. Your Honor can look -- you know, my adversary just made that up. Hermès has not sued any -- outside of the counterfeiting context, my adversary named a bunch of other references to Hermès, and Hermès hasn't brought suit against any of them.

Hermès didn't even sue Mr. Rothschild for his first Baby Birkin project because they didn't think it was an infringement, and that really bleeds into the purpose of the trademark infringement statute. Trademark infringement is about protecting consumers just as much as it is about protecting brands. It's to protect against consumer confusion, and here, consumers were confused. And Mr. Millsaps grandiosely says, well, Hermès can't tell you who or what, whether these individuals were confused. You know why? Because they bought on the blockchain, and they're

pseudonymous. We don't know who the identity is.

What we know for a fact is that at least one or two who posted on social media thought they were getting an Hermès bag. They wanted to know where their bag was. What we also know is that when these were sold, unlike what Mr. Millsaps said, they were sold for as much, for more than the value of a Birkin bag when they were shrouded images that were changed. Right? When they were first -- 16 were actually resold as a shrouded image before anybody knew what the image was. Mr. Millsaps would have you or Mr. Rothschild -- Mr. Millsaps, whichever -- would have you believe that that was because of the great art. Your Honor, they didn't know what the art was. They knew the name Birkin, and that was all it had to.

And I think that the test -- you know, we keep going back and forth about, he says that, when we talked about good faith, good faith is about the adoption of the mark. And there, when Mr. Millsaps says, well, these were private discussions, exactly. That's exactly the point. Mr. Rothschild was using the Hermès mark, the Birkin mark, and lying about having discussions with Hermès to get people, to get associates interested and involved in the project, to get them to think he wasn't going to be sued. He said he knew he could get a cease and desist letter.

What we haven't discussed as much is that Mr. Rothschild also had the MetaBirkins Discord chat, which is

a community of 36,000 members. He used that to advertise his other projects. He didn't produce the blockbusting discovery, but we produced it here, and it shows him saying that the members of the MetaBirkins community will get -- which means they don't buy a MetaBirkin, by the way. It's just you join the community, the first ten thousand will get, or first thousand will get white listed, meaning a special spot for his other projects. That's using the MetaBirkins name as a brand.

The whole point, the reason, and I'm really surprised by the comment that Hermès is changing its tune. Hermès didn't sue for copyright infringement. It didn't sue for trade dress infringement. It sued for trademark infringement. It's only sued because of the name Birkin. However, we look at conduct as a whole. That's the whole point of the *Polaroid* factors. And the whole point of the Polaroid factors is to look at conduct. And yes, he also happened to use -- now, if you use Birkin to sell a car, I don't know what the result would be. But he didn't. He used it to sell an image of a bag, where he copied, well, where the real, the artist, Mark Burden, copied the Birkin bag schematics.

As to actual confusion, the survey -- and again, Mr. Millsaps, I don't know if he -- a survey is not a *Polaroid* factor. There's no *Polaroid* factor about a survey. The survey measured, and your Honor can read it in the briefs, we think we're above the threshold. We're above the threshold that your

Honor has required. Nonetheless, the survey actually runs alongside the *Polaroid* factors. It's not about actual confusion. The actual confusion wasn't Hermès's friends and insiders. The actual confusion was, and this was what we produced, one of them was an intellectual property attorney who Mr. Millsaps grilled to see if she works for Hermès. She doesn't. It was the New York Post. It was Vogue. It was the people who posted online.

And then as to -- I think the argument that -- I know I'm running out of time, your Honor. I want to go -- I think a lot of Mr. Millsaps's arguments lean back into *Rogers* and what is the *Rogers* test. I mean he leans heavily into the *AM General v. Activision* case, and just to be clear about that case, that was a case where inside the game, I think it was Call of Duty, somebody was using a Humvee and there was a Humvee car. It wasn't in the title. You wouldn't know it until you were playing the game, and the point was there was no branding.

Here, the entire brand, everything, even when Mr. Millsaps makes his arguments, what does he keep referring to? He talks about the metaverse. Why? Because that's the brand. And I go back to Mr. Rothschild's statements early on, before there was a lawsuit, he said they were counterfeits. He called them Birkins. He talked about them as a brand. It wasn't a type. It was a brand, and that's what showed in the

Discord.

I also want to talk a moment about the comment --

THE COURT: You are well in excess of five minutes.

MR. WARSHAVSKY: OK. Can I finish this one point?

THE COURT: Yes.

MR. WARSHAVSKY: OK. It's just about whether or not Dr. Gopnik -- he keeps saying that Dr. Gopnik is unrebutted. You see in the Rule 56 statement that that's not the case. And in fact, when we quote Dr. Gopnik and use his quotes, Dr. Gopnik says this is out of context -- this is in yet another report. But Dr. Kominers's report actually talks about what really -- it says that Mr. Rothschild used all the social media to announce sales, transactions, prices, and throughout we show Mr. Rothschild's testimony at the time about getting whales, treating this as security, getting people to pump, getting people to !Shill. That's not an artist. That's treating this as a commodity.

And while Dr. Gopnik thinks that that's just like a contract or a restaurant or anything else as art, that comment, that's what 15 U.S.C. is meant to regulate.

I know I'm past my time, your Honor.

THE COURT: I'm sure there are many other things you wanted to respond to, but I think --

MR. WARSHAVSKY: I did.

THE COURT: -- we need to bring this to a halt at this

point. Thank you very much.

MR. WARSHAVSKY: Thank you.

THE COURT: I want to thank both counsel, who more than met my students' expectations, I'm quite confident. I should mention that I will resolve these motions no later than the end of this year, by December 31. If I'm really in a mischievous mood, I'll give it to you at 11:59 on December 31, and one of you can go out and get drunk and the other can go out and blow your horn.

But if, in fact, it turns out I don't award total summary judgment for either side, then we will have a trial, and the two possible dates for a trial are either January 30 or March 27. Why don't the two of you consult, talk to your witnesses, and so forth. Those are the only two possibilities, but if you're both agreed on one of them, I will choose that one. If you're not in agreement, I'll have to make an independent choice.

I'm reminded, years ago I complimented my wife's cousin, who was a very sophisticated lady, who had gone through four marriages, on her Gucci bag and she said to me, well, you know, men come and go, but a bag is forever.

So on that note, we will see you anon.

Thanks a lot.

(Adjourned)